Supreme Court of the United States.

No. 74.—October Term, 1904.

The People of the State of New York ex rel. The Metropolitan Street Railway Company, Plaintiff in Error, *vs.* The State Board of Tax Commissioners.	In error to the Supreme Court of the State of New York.

[May 29, 1905.]

On May 26, 1899, the legislature of New York passed an act amending the tax law of the State. (Laws of New York, 1899, c. 712, p. 1589.) The first section reads:

"Section 1. Subdivision three of section two of the tax law is hereby amended to read as follows:

"3. The terms 'land,' 'real estate,' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, under ground or elevated railroads, *including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public places;* all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, *including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes;* all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State. *A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, high-*

way, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax."

The portions in italics are the new matter introduced by the amendment. Other sections were added to the tax law, of which section 46 is as follows:

"§ 46. *Deduction from special franchise tax for local purposes.*—If, when the tax assessed on any special franchise is due and payable under the provisions of law applicable to the city, town, or village in which the tangible property is located, it shall appear that the person, copartnership, association, or corporation affected has paid to such city, town, or village for its exclusive use within the next preceding year, under any agreement therefor, or under any statute requiring the same, any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartnership, association, or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town, or village, except money paid or expended for paving or repairing of pavement of any street, highway, or public place, shall be deducted from any tax based on the assessment made by the State board of tax commissioners for city, town, or village purposes, but not otherwise; and the remainder shall be the tax on such special franchise payable for a city, town, or village purposes. The chamberlain or treasurer of a city, the treasurer of a village, the supervisor of a town, or other officer to whom any sum is paid for which a person, copartnership, association, or corporation is entitled to credit as provided in this section, shall, not less than five nor more than twenty days before a tax on a special franchise is payable, make and deliver to the collector or receiver of taxes or other officer authorized to receive taxes for such city, town, or village, his certificate showing the several amounts which have been paid during the year ending on the day of the date of the certificate. On the receipt of such certificate the collector, receiver, or other officer shall immediately credit on the tax roll to the person, copartnership, association, or corporation on an assessment of a special franchise for city, town, or village purposes only, but no credit shall be given on account of such payment or certificate in any other year, nor for a greater sum than the amount of the special franchise tax for city, town, or village purposes, for the current year; and he shall collect and receive the balance, if any, of such tax as required by law."

Other sections provide the machinery for assessment. This assessment was to be made by the State board of tax commissioners, and one section authorized certiorari to review their proceedings.

Under this law an assessment was made of the franchises belonging to the plaintiff in error, a corporation created by the consolidation of several corporations, having franchises for the maintenance and operation of street railroads in the city of New York. A certiorari to review this assessment was finally decided by the Court of Appeals of the State, which on April

28, 1903, (174 N. Y. 417,) sustained the assessment and remanded the case to the special term of the Supreme Court, by which court a final judgment was entered, June 22, 1903. Thereupon this writ of error was sued out. Plaintiff in error makes three assignments of error:

"I. Error in declining to hold that the act of the legislature of the State of New York, approved May 26th, 1899 (ch. 712, L. 1899), entitled 'An act to amend the tax law, in relation to the taxation of public franchises as real property,' in so far as it authorizes the assessment imposed by the State board of tax commissioners on March 20, 1900, upon the franchises of the [plaintiff in error], relator above named, deprives said relator of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

"II. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, denies to said relator the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

"III. Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of contracts, in contravention of section 10, article 1, of the Constitution of the United States."

Prior to 1874 the legislature of New York made direct grants of franchises, rights or privileges to use the streets of the city of New York. In that year the following amendment to the constitution was adopted (Constitution 1846, as amended, art. 3, sec. 18):

"The legislature shall not pass a private or local bill in any of the following cases: . . .

"Granting to any corporation, association or individual the right to lay down railroad tracks. . . .

"But no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the General Term of the Supreme Court, in the district in which it is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In 1884 an act was passed, (Laws 1884, chap. 252, p. 309,) giving to the local authorities power to grant franchises for street railroads. This act provided:

"SEC. 7. The local authorities of any incorporated city or village to whom application, under the provisions of this act, may be made for consent to the construction, maintenance, use, operation or extension of a street surface railroad upon any street, road, avenue or highway may, at their option, provide for the sale of and sell at public auction the fran-

chise, subject to all the provisions of this act, to so construct, maintain, use, operate or extend such street surface railway.

* * * * * *

"SEC. 8. Every corporation incorporated under, or constructing or operating a railroad constructed or extended under the provisions of this act, within the cities of the State having a population of two hundred and fifty thousand or more, as aforesaid, shall for and during the first five years after the commencement of the operation of any portion of its railroad, annually, on the first day of November, pay into the treasury of said respective cities in which its road is located to the credit of the sinking fund thereof, three per cent of its gross receipts for and during the year ending the next preceding thirtieth day of September, and after the expiration of said five years make a like annual payment into the treasury of said respective cities, for the credit of said sinking funds, of five per cent instead of three per cent of said gross receipts: *Provided, however*, That every corporation now existing and operating a street-surface railroad which shall extend its tracks or construct branches therefrom, and operate such extensions or branches under the provisions of this act, or the corporation operating such branches or extensions, shall pay such percentages as aforesaid only upon such portions of its gross receipts as shall bear the same proportion to the whole value thereof as the length of such extension and branches shall bear to the entire length of its tracks."

"SEC. 4. The consent of the local authorities shall in all cases be applied for in writing, and when granted shall be upon the express condition that the provisions of this act pertinent thereto shall be complied with, and shall be filed in the office of the county clerk of the county in which said railroad is located."

In 1886 an act amending a prior act of the same year was passed, (Laws 1886, chap. 642, p. 919,) which contained the following terms:

"SEC. 1. The local authorities of any incorporated city or village, to whom application may be made for consent to the construction, maintenance, use, operation or extension of a street railroad, or a railroad or railway for the transportation of passengers, mails, or freight, over, upon, under or through any of the streets, roads, avenues, parks or public places in such city or village, must provide, as a condition of the said consent to the use of said street, road, avenue, park or public place, that the right, franchise and privilege of using the said street, road, avenue, park or public place shall be sold at public auction to the bidder who will agree to give the largest percentage per annum of the gross receipts of said company or corporation, with adequate security as hereinafter provided, for the fulfillment of said agreement and for the commencement and completion of such road according to the plan or plans, and on the route or routes fixed for its construction, within the time or times hereinafter designated and prescribed therefor, but this agreement shall not release any such road from the percentages required to be paid by chapter two hundred and fifty-two of the laws of eighteen hundred and eighty-four. The legislature expressly reserves the right to regulate and reduce the rate of fare on such railroad or railway.

* * * * * *

"And in the event of the failure or refusal of the party or corporation operating or using the railroad to be constructed as aforesaid, to pay the

rental or percentage of gross earnings agreed upon, then, upon notice to the said party or corporation—of not less than sixty days—the said consent and right to operate such railroad may be declared forfeited, and the same may be resold to the highest bidder in the manner above provided."

The special acts passed before the amendment of 1874, which are claimed to constitute contracts, the obligations of which are impaired by this tax legislation, are found, first, in chap. 625 of the Laws of 1868, which granted to certain persons the right to construct, maintain and operate and use a street railroad, with a provision that "the said persons, or their assigns, shall pay to the sinking fund commissioners of the city of New York the sum of $1,000 per annum, to be applied by them in the same manner as moneys received on account of rentals and leases;" second, in chap. 19 of the Laws of 1871, which, granting the privilege of occupying certain streets with street railroad tracks, provided that the company should "make compensation to the mayor, aldermen and commonalty of said city of New York for the value of the rights and privileges herein granted or authorized," and also prescribed the mode of ascertaining that compensation by three commissioners, whose decision should be final and conclusive as to the company and the mayor, aldermen and commonalty of said city, adding "the amount so fixed and determined shall be paid to the commissioners of the sinking fund of said city, by the said company, within thirty days after the same becomes payable, according to the decision aforesaid, and applied to the reduction of the debt of said city"; third, in chap. 508 of the Laws of 1874, which granted the right to "construct, operate, maintain and use railways" in certain streets in the city of New York, and provided that "the said persons, or their assigns, shall annually, on the first day of November, pay into the treasury of the city of New York one per cent of the gross receipts of the road herein provided for, the amount of which gross receipts shall be determined by the sworn statement of the president and treasurer of said railway, but subject to the inspection of its books by the comptroller of the city of New York."

Subsequent to the law of 1884, above referred to, fifteen other franchises now belonging to the relator were granted by the common council of the city of New York. Most of them provided for annual payment to the city of New York of either a fixed amount or a fixed percentage, varying from two to eight per cent of the gross earnings.

Mr. Justice BREWER delivered the opinion of the Court.

The decision of the Court of Appeals settles that there is nothing in the law or the proceedings in this case in conflict with the constitution of that State. It is not contended by the plaintiff in error that there is any constitutional objection to the taxation of franchises. The right to subject them to a share in the burden of supporting the government is conceded.

The main contention is that this tax legislation impairs the obligation of contracts. It must be borne in mind that presumptively all property within the territorial limits of a State is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof and must make it entirely clear that, by contract or otherwise, the property is beyond its reach. In *Providence Bank* v. *Billings*, 4 Pet. 514, Mr. Chief Justice Marshall, in delivering the opinion of the court, said (p. 561):

"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

In *Vicksburg &c. R. R. Co.* v. *Dennis*, 116 U. S. 665, Mr. Justice Gray cited many authorities, quoting the different phraseology in which by the several writers of the opinions the same rule was announced. In *Wells* v. *Savannah*, 181 U. S. 531, the law was thus stated by Mr. Justice Peckham (p. 539):

"The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist."

In *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, the same Justice declared (p. 672):

"The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

See also *Erie Rw. Co.* v. *Pennsylvania*, 21 Wall. 492; *Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 279; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662.

This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public nothing passes by impli-

cation. As said by Mr. Chief Justice Taney, in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 549:

"The inquiry, then, is: Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied."

Applying these well-established rules to the several contracts, it will be perceived that there was no express relinquishment of the right of taxation. The plaintiff in error must rely upon some implication and not upon any direct stipulation. In each contract there was a grant of privileges, but the grant was specifically of privileges in respect to the construction, operation, and maintenance of a street railroad. These were all that in terms were granted. As consideration for this grant the grantees were to pay something, and such payment is nowhere said to be in lieu of or as an equivalent or substitute for taxes. All that can be extracted from the language used was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the power of taxation.

In the well-considered opinion of the Court of Appeals in this case it was stated by Mr. Justice Vann:

"The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year or a certain percentage of receipts, as a consideration, or 'in full satisfaction for the use of the streets.' There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation.

* * * * * *

"The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the State. There is no implied covenant that property sold by the State cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to State grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed

until by the act of 1899 amending the tax law they were added to the other taxable property of the State. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of government."

It would not be doubted that if a grant was of specific tangible property, like a tract of land, and the payment therefor was a gross sum, no implication of an exemption from taxation would arise. Whether the amount paid was large or small, greater or less than the real value, if the payment was distinctly the consideration of a grant, that which was granted would pass into the bulk of private property, and, like all other such property, be subject to taxation. Nor would this result be altered by the fact that the payment for the thing granted was to be made annually instead of by a single sum in gross. If it was real estate it would be equivalent to the conveyance of the tract subject to ground rent, and the grantee taking the title would hold it liable to taxation upon its value. If this be true in reference to a grant of tangible property it is equally true in respect to a grant of a franchise, for a franchise, though intangible, is none the less property, and oftentimes property of great value. Indeed, growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises. We had occasion to review this subject in *Adams Express Company* v. *Ohio*, 166 U. S. 185, where we said (pp. 218, 219):

"In the complex civilization of to-day a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a State from taxing at its real value such intangible property. . . . It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

In *State Railroad Tax Cases*, 92 U. S. 575, 603, is this language by Mr. Justice Miller, speaking for the court:

"That the franchise, capital stock, business and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions,' says this court in *Society for Savings* v. *Coite*, 6 Wall. 607, 'than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a

livelihood, may be taxed by a State for the support of a State government.' *State Freight Tax Case*, 15 Wall. 232; *State Tax on Gross Receipts*, 15 Wall. 284."

It is urged that when the public grants a privilege on condition of the payment of an annual sum the contract implies that the public shall exact no larger amount for that privilege, that to impose a tax is simply increasing the price which the grantee is called upon to pay for the privilege, and *Gordon* v. *Appeal Tax Court*, 3 How. 133, is relied upon as authority. It is true, in the opinion of the court, announced by Mr. Justice Wayne, is this language (p. 145):

"Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State? was repeatedly asked in the course of the argument. The reason is, that every one buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst its lasts, and any tax upon it would substantially be an addition to the price."

But there was in that case an express exemption from taxation in these words:

"'And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.'"

There being thus an express stipulation on the part of a State not to impose any further tax or burden, the question decided was really the extent of the exemption, and it was held to apply not merely to the franchise but to the property of the bank. The statements of Mr. Justice Wayne were only by way of argument to support the conclusion that the exemption went beyond the franchise alone. Furthermore, that case has been repeatedly qualified and limited by subsequent decisions. In *New Orleans City Railroad Company* v. *New Orleans*, 143 U. S. 192, Mr. Justice Gray, speaking for the court, said (p. 195):

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg &c. R. R.* v. *Dennis*, 116 U. S. 665, and cases cited. Assuming, without deciding, that the city of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the State, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property. In *Gordon* v. *Appeal Tax Court*, 3 How. 133, upon which the plaintiff in error much relied,

the only point decided was that an act of the legislature continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the State was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. *State Bank* v. *Knoop*, 16 How. 369, 386, 401, 402; *People* v. *Commissioners*, 4 Wall. 244, 259; *Jefferson Bank* v. *Skelly*, 1 Black. 436, 446; *Farrington* v. *Tennessee*, 95 U. S. 679, 690, 694; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 328. The case at bar cannot be distinguished from that of *Memphis Gas Light Co.* v. *Shelby County*, in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas works and making and selling gas for fifty years; and, speaking by Mr. Justice Miller, said: 'The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the State to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the State that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The Constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the States. That is left to the State constitutions and State laws.' 109 U. S. 398, 400."

Murray v. *Charleston*, 96 U. S. 432, is not in point. The city of Charleston, having issued bonds, subsequently passed an ordinance assessing a tax upon all real and personal property in the city, and directed the treasurer to retain out of the interest due on those bonds the amount of the tax. Murray was a resident of Germany and resisted the reduction of interest, and it was held that the city could not by way of a tax reduce the amount of the interest which it had promised to pay to this non-resident holder, the court saying in its opinion (p. 440): "A non-resident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city; and the city council was authorized to make assessments only upon the inhabitants of Charleston, or those holding taxable property within the same."

Chicago v. *Sheldon*, 9 Wall. 50, is also not in point. An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, &c., of the streets on which its railway was authorized to be constructed. The company, having accepted and complied with the terms of this ordinance, the city attempted by assessments for special improvements to compel the rail-

way company to pay for further work of the nature required by the original ordinance, and it was held that the obligations assumed by the railway company in respect to street improvements, as provided by the ordinance, could not be increased by special assessments for further improvements. But this involved no question of liability to general taxation, and only held void the effort of the city under the guise of special assessments to increase the obligations specifically assumed by the railway company under the original ordinance.

In *New Jersey* v. *Yard*, 95 U. S. 104, there was a contract that a certain tax should "be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State, or any law thereof," and the decision simply upheld that exemption specifically contracted for.

It is further contended that there has been a recognition and practical construction in respect to the grants of these franchises, and on these grounds: First, no attempt has been made to legislate in respect to their taxation until 1899, although some of them had been in existence for many years; second, Governor Cleveland in one of his messages called the amount required to be paid by the contract a "tax," and Governor Roosevelt also spoke of existing "taxes;" third section 46 of the legislation authorizing the tax upon these franchises provided that "any sum based upon a percentage of gross earnings, or any other income, or any license fee, or any sum of money on account of such special franchise, granted to or possessed by such person, copartners association or corporation, which payment was in the nature of a tax, all amounts so paid for the exclusive use of such city, town or village, except money paid or expended for paving or repairing of pavements of any street, highway or public place, shall be deducted from any tax based on the assessment made by the State board of tax commissioners for city, town or village purposes, but not otherwise; and the remainder shall be tax on such special franchise payable for city, town or village purposes;" fourth, the Court of Appeals of New York in *Heerwagen* v. *Crosstown Street Railway Company*, 179 N. Y. 99, 104, said:

"In the first place, both in statutes and in judicial decisions the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenues from private property which the State or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights, which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the State is at liberty to grant or to withhold at pleasure."

We are not disposed to undervalue the force of these suggestions, but it would be giving them undue significance to hold that they are potent to

displace the power of the State to subject to the burdens of taxation property within its limits. The word "tax" is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of the charge or burden imposed by the State for the purposes of revenue for its support. Undoubtedly the payment for the franchise of an annual sum was a burden, and in that sense it might not unnaturally have been spoken of as a tax. Being recognized as a burden it may also well be that when the franchise itself was of comparatively little value the legislature did not see fit to subject it to the burdens of ordinary taxation. But the omission of one legislature or a dozen legislatures does not destroy the power of the State. The language quoted from section 46 indicates the desire of the legislature to deal equitably with the corporations holding these franchises. Surely the manifestation of this desire cannot be construed into a repudiation of power. These annual charges are not called taxes, but are spoken of as in the nature of a tax, and the legislature recognizing the equitable force of the claim based thereon provided that the corporation be given credit for sums thus payable. In this connection it is well to recall that in section 1 of the act of 1886, *supra*, these annual charges are called "rental or percentage of gross earnings."

The quotation from the Court of Appeals must be interpreted in the light of the question presented. That was whether the appellee company was entitled to avail itself of the provision of sec. 46 just quoted, it having been required by its charter to pay a certain percentage of its gross receipts. It was held that it was so entitled, and the argument was to show that the words "in the nature of a tax" were used in a broad and comprehensive sense to include a payment made on account of the privilege granted. No question was made or considered as to the liability of the company to the tax on its franchise. Its only claim was to the deduction on account of the percentage of its receipts already paid. The court, in addition to the language quoted, said (p. 106):

"The statute in question was enacted at a special session of the legislature convened by the governor for that purpose. In his message to the legislature he recommended that 'it should be provided that from the sum assessed by the State authorities as the tax which a corporation must pay because of its local franchise there shall be deducted the amount already annually paid by it to the locality for such franchise. In no other way is it possible to tax these corporations with uniformity and equity.' It may be that this view is erroneous, and that the more accurate and equitable way would be to determine the value of the franchise, not as free and clear, but as burdened by the charges to which it might be subject. Nevertheless it is plain that this view was accepted by the legislature, for under the scheme provided by the present statute the franchise is to be assessed as real estate; that is to say, not subject to diminution for charges thereon, and the allowance for such charges is made only by deducting them from the tax."

We are of opinion that no contract right of the relator was impaired by the legislation in question.

It is further insisted that the special franchise tax law denies the relator the equal protection of the laws and due process in three separate and distinct aspects, "namely, (1) in that it adds to the obligations of their various contracts while preserving all the burdens of those contracts; (2) in that it provides for the deduction of annual payments covered by existing contracts from the amount of tax levied, by reason of which deduction those who agreed to pay for their franchises lump sums or annual amounts less than the new tax are discriminated against; and (3) in that it discriminates against them and subjects them to taxation, while their competitors operating under the surfaces of many of the same streets are to be exempted."

The first specification is answered by the conclusion that we have reached in respect to the claim of an impairment of contract obligations, for if there was no such impairment the fact that the companies have escaped the burden for these many years is their good fortune, and in no manner discharges them from the ordinary burdens of taxation which the present law imposes.

With respect to the second, it may be observed that the lump sum is so obviously a payment for the franchise that it cannot be considered in any just sense as possessing the nature of a tax. It is not even rental. It is like money paid for a tract of land, part of the purchase price. It does not, like a percentage of the gross receipts, vary with the changes of business, has no resemblance to a continuing discharge of the obligation which property is under for contribution to the support of the Government. Further, this whole matter of allowing a reduction on account of that which is spoken of as "in the nature of a tax" is a matter of grace on the part of the legislature. The franchises granted were, as we have held, subject to taxation, and the fact that upon equitable considerations the State has consented that a certain reduction shall, in some cases be made, does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is nothing in the Federal Constitution to prevent a State from granting exemptions from taxation. *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232.

With regard to the third contention, it may be said that there is a difference between surface and subsurface street railroads sufficient to justify a diversity in the mode and extent of taxation. In *Savannah &c. Railway Company* v. *Savannah*, *ante*, p. , just decided, taxation of a street railroad was challenged on the ground that a steam railroad which ran into the city and along its streets, and there did some of the same kind of work as the ordinary street railroad, was not subject to the same tax, and, referring to

this contention, is this declaration by Mr. Justice Holmes: "The difference between the two railroads is obvious and warrants the diversity in the mode of taxation." Further, the condition of the title to the only subsurface road in the city of New York clearly puts it in a class by itself.

These are all the questions we deem it important to consider. We find no error in the decision of the Supreme Court of New York, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

OCTOBER TERM, 1904.

The People of the State of New York ex rel. The Twenty-third Street Railway Company, Plaintiff in Error,
75 *vs.*
The State Board of Tax Commissioners.

The People of the State of New York ex rel. The Central Crosstown Railroad Company, Plaintiff in Error,
76 *vs.*
The State Board of Tax Commissioners.

The People of the State of New York ex rel. The Consolidated Gas Company, Plaintiff in Error,
77 *vs.*
The State Board of Tax Commissioners.

The People of the State of New York ex rel. The New Amsterdam Gas Company, Plaintiff in Error,
78 *vs.*
The State Board of Tax Commissioners.

The People of the State of New York ex rel. The Coney Island and Brooklyn Railroad Company, Plaintiff in Error,
80 *vs.*
The State Board of Tax Commissioners.

In error to the Supreme Court of the State of New York.

[May 29, 1905.]

Mr. Justice BREWER delivered the opinion of the Court.

While these cases differ in some details from the two preceding, in which opinions have just been announced, there are no such differences as put them outside the scope of the reasoning of those opinions. Therefore, the judgments in them are

Affirmed.

Supreme Court of the United States.

No. 79.—October Term, 1904.

The People of the State of New York ex rel. The Brooklyn City Railroad Company, Plaintiff in Error, vs. The State Board of Tax Commissioners.	In error to the Supreme Court of the State of New York.

[May 29, 1905.]

This case, like the preceding, involves the special franchise tax law of New York. The facts are these: On December 22, 1853, the relator was authorized by the city of Brooklyn to construct, maintain and operate street surface railroads upon specified streets, and required to enter into a good and sufficient bond conditioned for the faithful performance of all the terms and stipulations in the resolutions granting the authority. On December 30 of that year a bond in the sum of $200,000 was duly executed by the relator and [redacted] has ever since been kept in force. The terms and stipulations as to the construction and operation of the railroad need not be mentioned. The resolutions contained these further provisions.

"The rates of fare for each passenger and the license fee for each car to be paid annually into the city treasury shall be on the respective lines above mentioned:

"1. Furnam street route, fare not to exceed five cents, license fee, $50. 2. Court street route, fare not to exceed four cents, license fee, $20. 3. Powers street route, fare not to exceed five cents, license fee, $20. 4. Flatbush avenue route, fare not to exceed five cents, license fee, $20. 5. Fulton avenue route, fare not to exceed four cents, license fee, $20. 6. Myrtle avenue route, fare not to exceed four cents, license fee, $20. 7. Sands street route, fare not to exceed five cents, license fee, $10. 8. Front street route, fare not to exceed five cents, license fee, $10."

This action of the city of Brooklyn was validated by the State legislature. Other contracts were made by the city of Brooklyn with other companies. Those companies were subsequently consolidated with the relator, which, on the 1st of January, 1900, held forty-five similar contracts with the municipalities for the construction, maintenance and operation of street surface railroads in the present boroughs of Brooklyn and Queens. Some of these contracts required the annual payment of a certain percentage of the gross receipts. Subsequently, under due legislative authority, the contract arrangements between the relator and the city were modified in re-

spect to the amount of the annual license fee. The statute authorizing the modification contains this clause:

"The said license fees shall be taken in full satisfaction for the use of the streets or avenues, but the same shall not release said company from any obligations required by law to keep such streets or avenues, or any part thereof, in repair, which said obligations and the contracts, laws or ordinances creating and enforcing the same are hereby continued in full force and operation."

Mr. Justice BREWER delivered the opinion of the Court.

Do these license fees stand as an equivalent for property taxes so that a stipulation in respect to them relieves the property from liability to ordinary taxation? This certainly would not be the general rule. A license fee is understood to be a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax. Take the vast volume of occupations which are subject to licenses from either the Nation or the States. Who supposes that in the absence of some express stipulation the fees charged for those licenses operate to relieve the property employed in the business from the ordinary burdens of property taxation? The precise question as to the effect of an ordinance imposing a license fee for cars used on a street railroad was before the Court of Appeals in *Mayor &c.* v. *Broadway &c. Railway Company*, 97 N. Y. 275, in which, on page 282, the court said:

"The contract of the defendant arises from the provisions of its charter by which it agrees to pay a certain sum reserved therein in consideration of the privileges conferred thereby. It is neither a tax nor is it a penalty, and hence the technical rules as to penal actions or suits to recover a tax which are invoked by the appellant have no application."

Further, in the statute modifying the license fees, which was accepted by the relator, it was expressly stated that they should "be taken in full satisfaction for the use of the streets or avenues." Clearly, therefore, the fees being imposed for a specific purpose, they cannot exempt the relator's property from the tax imposed by the special franchise tax law.

It is further objected that there was a failure of due process of law in that the special franchise tax law did not indicate any principle or method for ascertaining the value of the intangible property included in the special franchise, and that the State board did not make any separate valuation of the tangible property, and did not adopt or proceed upon any principle or method in valuing the totality of the tangible and intangible property, but necessarily indulged in mere speculation and guesswork instead of exercising judgment in making the valuation.

We are of opinion that this objection is without merit. The sections relating to the taxation of special franchises were enacted as amendments

to and part of the general tax law of the State, and are to be construed accordingly. By one section the valuation is to be determined by the State board of tax commissioners. By another the owner of every such franchise is required to make a written report to the State board, containing a full description of the franchise, a copy of the special grant, ordinance or contract under which it is held, or, if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon the franchise, together with such other information as the State board may require; and that board is authorized to require, from time to time, further reports containing information upon such matters as it may specify. Not only that; after making the valuation the State board is required to give notice in writing to the owner of the franchise, stating the valuation, and that on a day specified, not less than twenty nor more than thirty days thereafter, it will meet to hear and determine any complaint against such assessment, and this notice must be served at least ten days before the day fixed for the hearing. At the hearing the owner may file a statement under oath specifying the respect in which the valuation is incorrect; testimony may be taken and a full investigation had. Another section provides for a review of the assessment by writ of certiorari. These provisions were all complied with. Notice was given to the relator, and on the day fixed for the hearing it appeared and filed its objections. Thereafter it took out a writ of certiorari to review the proceedings of the tax board. Surely by this due process of law was secured. It will not do to say that the valuation of a piece of property is mere guesswork. True, it is often largely a matter of opinion, and mathematical exactness is not always possible. Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that can be required is that the assessing board exercise an honest judgment based upon the information it possesses or is able to acquire. That valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value. We are of the opinion that the relator was not denied due process of law in the valuation and assessment of its franchise.

We see nothing else in the record calling for notice, and the judgment of the Supreme Court of New York is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.